

STATE OF MICHIGAN
COURT OF APPEALS

JAMES VELTING and KV INVESTMENTS
LLC,

UNPUBLISHED
May 5, 2005

Plaintiffs-Appellants,

v

No. 250946
Kent Circuit Court
LC No. 99-008930-CZ

CASCADE CHARTER TOWNSHIP,

Defendant-Appellee.

Before: Murray, P.J., and Markey and O’Connell, JJ.

MURRAY, P.J. (*concurring in part, dissenting in part*).

The majority has concluded that, other than plaintiffs’ substantive due process claims under the state constitution, the trial court’s decision should be affirmed. My view is that the trial court should be affirmed in all respects.

The two main claims prosecuted by plaintiffs are the substantive due process claim (count VI) and the takings claim (count IV). The majority holds that the substantive due process claim must be remanded because the trial court applied the incorrect standard of review. However, whatever the appropriate standard of review for the trial court to apply on the substantive due process claim – and that presents an interesting legal issue¹ – plaintiffs cannot

¹ Unlike the majority, I am not so certain that *Arthur Land Co, LLC v Otsego Co*, 249 Mich App 650; 645 NW2d 50 (2002), supplies the correct standard of review for the trial court to apply in this case. *Arthur Land Co* involved a request to rezone, which involves a legislative type decision. *Id.* at 664. In this case, however, plaintiffs submitted a request for a special planned unit development (PUD), not a request to rezone. Additionally, the ordinance provides for sand mining in a residential zone, so long as a PUD is approved. As the *Arthur Land Co* Court noted, *id.* at 665, *Carleton Sportsman’s Club v Exeter Twp*, 217 Mich App 195; 550 NW2d 867 (1996), addressed the proper standard of review from a township board’s decision to deny a special land use permit or PUD. *Carleton*, *supra* at 199. If *Carleton* applies, the trial court applied the correct standard of review. However, that issue need not be decided because plaintiffs’ claim for monetary damages under the state constitution cannot survive scrutiny under any standard of review.

recover monetary damages against defendant, which is all that plaintiffs are seeking. As the majority recognizes, a party cannot recover monetary damages against a municipal defendant when there are alternative remedies available under, for example, 42 USC 1983. *Jones v Powell*, 462 Mich 329, 337; 612 NW2d 423 (2000). Indeed, the plaintiff's state constitutional claim in *Jones* was unsuccessful precisely because the plaintiff could pursue a damage remedy under 42 USC 1983. Rather than being presumptuous, in my view it is incumbent upon this Court to uphold the dismissal of plaintiffs' state constitutional "substantive due process" claim when all they seek are monetary damages. How plaintiffs could seek to recover damages on remand is irrelevant if no damages are recoverable at all.

However, plaintiffs' separate takings claim² is not barred by *Jones* because the takings clause specifically affords such relief when a takings is established. Const 1963, art 10, § 2. See *Miller Bros v Dep't Nat Resources*, 203 Mich App 674, 679; 513 NW2d 217 (1994). But, as the majority has properly concluded, the trial court correctly rejected plaintiffs' takings claim. Moreover, the takings analysis employed by the trial court was not dependent upon the standard of review utilized under the substantive due process review, as the trial court correctly applied a de novo standard. For these reasons, I would affirm the trial court's decision in its entirety.

/s/ Christopher M. Murray

² At oral argument plaintiffs' counsel seemed to argue that the substantive due process and takings claims were one in the same, citing to *Miller Bros v Dep't Nat Resources*, 203 Mich App 674, 679; 513 NW2d 217 (1994), and *K & K Constr v Dep't Nat Resources*, 456 Mich 570; 575 NW2d 531 (1998). Neither case stands for that proposition, and plaintiffs' amended complaint (¶¶ 83-85, 99) makes it evident that they were using their substantive due process argument (i.e., that defendant acted unreasonably in denying the PUD) as a basis for the separate takings claim. See *Bevan v Brandon Twp*, 438 Mich 385, 391; 475 NW2d 37 (1991).